

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 279 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

CADILA CHEMICALS PVT LTD

Versus

U.S VITAMIN (INDIA)LTD

Appearance:

MR KN RAVAL for Appellant.

MR PRANAV G DESAI for Respondent.

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 08/09/97

ORAL JUDGEMENT

This appeal is directed against the judgment and order dated July 13, 1989 passed by the City Civil Court, Ahmedabad rejecting the Notice of Motion filed by the present appellant-plaintiff in Civil Suit No. 2864 of 1989. By the said Notice of Motion the plaintiff company prayed for interim injunction to restrain respondent-defendant Company from marketing their product under the brand name of FAMOTIN or (any other name which

is likely to pass off their product as and for the product of the plaintiff) and for other ancillary reliefs.

2. The City Civil Court rejected the notice of motion on the following grounds:

- (i) even though there may be visual and phonetic similarity in brand names FAMOTIN and FAMONIT, but since the medicines are the scheduled drugs it will be difficult to come to the conclusion that that two marks FAMOTIN and FAMONIT are so deceptive and similar as to cause confusion in the minds of persons who have to deal with and deal in them namely Doctors and Chemists.
- (ii). According to the plaintiff, it started marketing production of this particular medicine on 17-5-1989 and the defendant company has started marketing production of its product in question on 22.5.1989. The difference is only of five days in which Sunday and Saturday are included.
- (iii). there is no evidence that substantial sale was effected during the aforesaid period of five days. There is no evidence that because of the defendant company's entry into the business, the sale of the plaintiff is affected. According to the defendant Company they had sold their product FAMOTIN worth Rs.42 lacs, whereas the plaintiff had sold the their product FAMONIT worth Rs.3.5 lacs.

3. To assail the first finding, reliance has been placed on behalf of the appellants on the judgment dated June 11, 1996 of this Court in Appeal from Order No. 275 of 1996 between Cadila Pharmaceuticals Ltd. and Torrent Pharmaceutical Ltd. wherein the view taken is that the test to be adopted is not the knowledge of the doctor, who is giving the prescription but whether unwary customer who goes to purchase the medicine is likely to make a mistake. In that case this Court has referred to the judgment of the Delhi High Court reported in AIR 1989 Delhi 44, wherein it was observed that though medicines like CALMPOSE are sold on doctor's prescription, it is not unknown that the same are also available across the counter in the shop of various chemists. and the chemists who may not have CALMPOSE may pass on the medicine CALMPROSE to an unwary purchaser.

4. It would appear that the reasoning which appealed

to the trial Court that the medicines in question being scheduled drugs, the scope of confusion would be much less would have warranted serious examination in view of the aforesaid judgment of this Court. This Court would have undertaken the said exercise if the plaintiff had made out an unimpeachable case of prior user for a substantial period. In the facts of the case however, it is not possible to give such a finding at this stage.

5. After this Court admitted the petition but refused to grant interim relief in favour of the appellant- plaintiff, the matter was taken to the Apex Court and by order dated November 17, 1989 this Court was requested to dispose of the appeal before December vacation (presumably December of 1989) and the respondent had agreed that it will maintain a separate account for the sale of the drug in question.

For whatever reason it appears that the appeal could not be taken up for hearing and the appeal has reached hearing in the year 1997.

6. In view of the above discussion, no interference is called for with the aforesaid order passed by the City Civil Court, Ahmedabad except a modification on the lines of condition imposed by the Apex Court that the respondent shall maintain a separate account for the sale of the drug in question till disposal of the suit.

7. It is clarified that the observations in this judgment are for the limited purpose of deciding the present appeal and the trial Court shall decide the matter in accordance with law without being influenced by the observations made at this stage.

8. As the suit is pending since 1989, it would be just and proper to direct the City Civil Court, Ahmedabad to hear and decide the suit as early as possible, preferably by March 31, 1998.

9. Subject to aforesaid directions, the appeal is dismissed. There shall be no order as to costs.

...
sharma